

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF WEST VIRGINIA,  
STATE OF TEXAS, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and  
REGINA MCCARTHY,

Respondents.

Case Nos. \_\_\_\_\_

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**DECLARATION OF NEW JERSEY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

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I, Bob Martin, declare as follows:

1. I am the Commissioner of the New Jersey Department of Environmental Protection (DEP).

2. I have a Bachelor of Economics degree from Boston College and a Master of Business Administration degree from the George Washington

University. I have served as DEP's Commissioner since January 2010. During that time I have overseen air pollution control rule development, permitting, and management of New Jersey's air pollution control program.

3. Prior to my appointment as Commissioner, I spent more than 25 years in the private sector, during which time I worked with large utility and energy companies in the United States, Canada, the United Kingdom, and throughout Europe.

4. Based on my position and experience, I have the personal knowledge to understand the steps NJ will need to take in the future to comply with the requirements of EPA's Section 111(d) Rule (the Rule), including the submission of a State Plan to EPA, which is necessary to implement the Rule.

5. To comply with EPA's Section 111(d) Rule and meet the September 6, 2018 deadline for final plan submittal to EPA, DEP must immediately begin developing a State Plan. There can be no delay while this matter is pending in the Court, otherwise NJ would find itself in violation of the Rule if it were to be upheld by the Court.

6. According to EPA, emissions credit trading is an important and cost-effective compliance option that states should consider when developing their State Plans. However, EPA has not yet finalized its model trading rules, and is not expected to finalize them until the third quarter of 2016. As a result of EPA's incomplete

regulatory regime for trading as of publication of the Rule, NJ will be unable to properly consider whether emission trading is even a viable option for NJ.

7. By the time EPA's model trading rules are expected to be finalized, NJ will only have two years to submit its final State Plan. Based upon NJ's experience and well-established past practice with EPA, two years is not sufficient time to accomplish the scientific, technical and regulatory work that is necessary to complete a final State Plan, such as power use and source evaluations and options modeling as more fully described below. Absent a stay, NJ will be forced to either develop a State Plan based on incomplete information, which could lead to economically inefficient and potentially arbitrary policy choices, or risk abdicating NJ's sovereignty to EPA through the imposition of a federal plan, which the Rule will impose on NJ if a State Plan is not submitted.

8. Based on my knowledge and experience, I have determined that implementing EPA's section 111(d) Rule at the State level will be extremely complex, time-consuming and costly. I believe it will require an implementation effort that exceeds all others previously undertaken by DEP under the Clean Air Act. NJ will be required to:

- develop as complete an understanding of the Rule as possible, under circumstances where many substantive issues cannot be resolved because the Rule is incomplete and not comprehensible;

- comment on the proposed federal plan and proposed model emission trading rules;
- evaluate the approximately 30 options for State Plan paths included in the Rule and EPA's proposed 111(d) rules;
- reevaluate these options when the model trading rules are adopted by EPA (scheduled for adoption in the third quarter of 2016);
- select potentially viable options for more detailed consideration by the State;
- consult with other states to determine if there are potential interstate trading partners that might provide mutual benefit;
- consult with stakeholders in NJ;
- consult with the operators of the PJM electric grid (which includes NJ) on electric reliability implications of the options under consideration,
- consult with load serving entities and generators;
- consult with the NJ Division of Rate Counsel;
- reevaluate potentially viable options for NJ with the input of PJM and NJ stakeholders;
- conduct detailed dispatch modeling and macroeconomic analyses of NJ's options;
- select the most viable option for NJ;
- determine if new legislation is needed and seek that legislation;
- determine what regulatory adoptions are needed;
- commence an estimated 24-month rule drafting, proposal and adoption process (possibly longer given the complexity and uncertainties of EPA's rules);

- create an organizational structure to implement NJ's State Plan; and
- determine the staffing needed to implement and enforce the State Plan and secure that staffing.

9. Implementation of the Rule is even more complicated and time consuming than usual because major legislative and regulatory changes must be pursued with the New Jersey Board of Public Utilities (BPU). The coordination of these necessary legislative and regulatory changes by multiple areas of State government requires much more effort than independent regulatory actions by these State agencies. This required coordination affects and extends the timeframes to complete the evaluation of EPA's final rules, the selection of a compliance path, and the legislative and regulatory process to follow that path. This will require significant staffing, the ultimate level of which is unknown until EPA's model rules are finalized, understood and staffing needs determined.

10. As noted above, EPA's proposed model trading rule offers an example of the challenge posed to States by EPA's complicated and incomplete regulatory regime under Section 111(d). The Rule discusses emissions trading as an important and potentially cost-effective compliance option for states' 111(d) plans. EPA has proposed two "trading ready" programs as part of the Rule. However, these proposed rules are not even complete and contain numerous substantive components that are subject to change until EPA adopts its trading provisions. Also, EPA's proposed

“trading ready” model trading rules for rate-based states include a number of technologies that have limited or no practical viability in NJ during the compliance period (new nuclear capacity, nuclear uprates, geothermal, utility scale hydro). Additionally, it appears that to effectively use trading, NJ will need to develop a customized trading rule that includes offshore wind, landfill gas recovery and power production, and other potential renewable energy components that may become viable and cost effective in NJ. However, NJ is forced to wait for EPA to finalize its trading rules before it can even consider customizing a trading program to use in its State Plan.

11. While NJ must wait for EPA to finalize its trading rules, it does not receive a corresponding extension for developing a State Plan. This condensed period could force NJ to develop a State Plan that does not fully reflect all of NJ’s ultimate policy objectives, thus infringing on NJ’s sovereignty. This condensed period would also force NJ to develop a State Plan that is less cost effective than if NJ had the opportunity to fully evaluate and include all options for trading. Further, this shortened period may deprive NJ of the time needed to coordinate with other states and achieve the potential efficiencies associated with interstate trading. Overall, this condensed period may result in the development of a State Plan which does not incorporate the legitimate and critical policy considerations inherent in New Jersey’s

authority to govern in the best interests of its citizens, the environment, and its economy.

12. Developing a State Plan will be further complicated by the fact that NJ will not be able to comply with its emission limit by directly regulating the emissions from affected Electric Generating Units (EGUs), which previously had been the conventional, legal means by which EPA and the states have regulated emissions from source categories under Section 111 of the Clean Air Act . Under the Rule, EPA has assigned to NJ a target emission rate that is well below the technologically feasible emission rate for existing fossil-fuel fired EGUs. As a result of EPA's unattainable target emission rate for existing EGUs, NJ will be forced to regulate "outside the fence" of affected EGUs in order to comply with the Rule, i.e. regulate activities beyond the affected EGUs' physical boundaries. The Rule's requirement that NJ regulate "outside the fence" of affected EGUs is an unprecedented regulatory approach under Section 111 of the Clean Air Act.

13. EPA's stringent emission limits for existing EGUs will produce immediate and unexpected harms to affected EGU owners, NJ ratepayers and the business economy. As a result of the Rule, existing EGUs will be at a disadvantage compared to new sources because both existing and new combined cycle natural gas units will meet the 111(b) standards with relative ease but only the existing EGUs will need to purchase allowances or emission reduction credits (ERCs). Congress

instructed EPA to be conscious of the remaining useful life of existing sources under Section 111(d), not put existing sources at a competitive disadvantage. The costs of compliance will be shifted to businesses and ratepayers in the form of higher energy costs. Importantly for the stay application, many of these costs will be incurred during the time that this matter is pending in the Court if a stay is not issued.

14. Furthermore, while EPA claims that states have many options to comply with the Rule, most of the options referenced by EPA are simply not available to NJ. This is because many of EPA's proposed compliance options already have been fully utilized in NJ. NJ's early efforts in supporting clean energy are not eligible for credit under the Rule because EPA chose to credit only those actions taken after the 2012 baseline year that EPA arbitrarily set, effectively penalizing NJ for being a leader in this field.

15. NJ already has invested approximately \$3.27 billion in ratepayer funds to advance solar development and energy efficiency initiatives before 2013. These investments and their attributes are rejected by EPA for compliance credit under the Rule even though these investments will continue to produce clean energy and energy savings well into the compliance period of the Rule. I believe that EPA's rejection of these investments for compliance credit will have the effect of stranding these assets because otherwise identical post-2012 facilities will be favored because they will provide credit towards compliance with the Rule. Until EPA finalizes its proposed



model trading rules, the impact on NJ's ratepayers and developers of pre-2013 solar energy and energy projects is difficult to ascertain, although the impact will most likely be measured in billions of dollars of stranded investments, i.e, investments that would otherwise have a higher value in the market but will be compromised due to the Rule's preference for newer investments. And once these investments are lost or withheld, they cannot be recovered without lingering, irreparable damage to NJ's economy.

16. The energy industry in the State of New Jersey must begin making decisions that will affect energy prices based on this final regulation, attempting to find certainty in this incomplete regulatory regime. Therefore, New Jersey's electricity distribution companies will be impacted in numerous ways especially with regard to the fact that the price of their products will be higher than it would have been without the regulations. EPA estimated in its Regulatory Impact Analysis that annual compliance costs will be \$5-\$8 billion. But Fitch Ratings company, citing various sources, states that average annual compliance will be \$28 billion.<sup>1</sup> Higher electricity prices significantly impact residential customers, particularly low-income customers who spend a higher percentage of their income on energy. Spending more on energy

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<sup>1</sup> Pidherny, D., Greene, R., Sonola, O., & Bains, R. (January 30, 2015). *The Carbon Effect: Assessing the Challenges for Public Power, Special Report*. Fitch Ratings, Inc.

will reduce the resources they have available to purchase other goods and services thereby lowering their standard of living.

17. In commercial and industrial markets, higher electricity prices reduce profitability, creating disincentives for investment and job growth. Given that New Jersey already has some of the highest electricity prices in the nation caused in part by its already aggressive response to environmental concerns, further increases are likely to have deleterious employment impacts, and that high electricity prices are one reason for the continuing decline in the manufacturing base in New Jersey. Most manufacturers compete in a global marketplace and cannot absorb higher electricity prices.

18. The U.S. Chamber of Commerce estimates the Rule will decrease GDP by \$51 billion annually, leading to an average of 224,000 fewer jobs each year, causing a cumulative loss of \$586 billion in income by 2030.<sup>2</sup> States like New Jersey, with already high energy costs, will suffer proportionally more of these job losses.

19. To summarize, the Rule creates a “Catch 22” for NJ in light of EPA’s incomplete trading rules and unattainable emission targets. State Plan deadlines are included in the Rule, but the rules governing trading under the Rule are not and will not be final until late 2016, leaving states to decide whether to wait for final trading

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<sup>2</sup> U.S. Chamber of Commerce’s Institute for 21<sup>st</sup> Century Energy. (2014) *Assessing the Impact of Potential New Carbon Regulations in the United States*.

rules or begin developing a plan that may be inefficient and more costly to ratepayers. This dilemma is compounded by the numerous options for compliance, most of which are dependent on the finalization of the model trading rules in order to reasonably evaluate their implementation feasibility and costs. EPA's approach effectively eliminates options that may be most cost effective for NJ, could cause irreparable harm to the economy of the State, and could infringe on NJ's sovereignty if EPA were to impose a plan on NJ.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this twenty-second day of October, 2015, at Trenton, New Jersey.



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Bob Martin, Commissioner